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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 173

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellees base their motion to dismiss on a claim that there is a variance between the question presented in the government's Jurisdictional Statement and that set out in the notice of appeal, filed April 15, 1961. In the notice of appeal the question put was:

> Whether the last clause of section 3 of the Robinson-Patman Act (15 U.S.C. 13a) prohibiting the charging of "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is so vague as to make

> its enforcement as a criminal statute unenforceable under the Fifth and Sixth Amendments to the United States Constitution.

This question, as worded in the Jurisdictional Statement, reads:

> Whether the provision of section 3 of the Robinson-Patman Act making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition is, as applied to sales made below cost with such purpose, unconstitutionally vague and indefinite.

More concisely, the question in the notice of appeal was "Whether the Act is unconstitutional," while the question in the Jurisdictional Statement was "Whether the Act is unconstitutional, as applied to this indictment."

We think it clear that the limitation made in the Jurisdictional Statement constitutes no prejudicial variance in contravention of Rule 15(1)(c)(2), and that the question, as there stated, is the one presented by this case. Under the controlling decisions of this Court, the limitation on the question made in the Jurisdictional Statement would be compelled irrespective of whether the appellant articulated it in the notice of appeal or the Jurisdictional Statement. For the constitutionality of a criminal statute may be decided only in the context of the indictment challenged, and the question of whether Section 3 of the Robinson-Patman Act is "on its face" unconstitutionally vague must accordingly be determined with respect to the sales below cost conduct charged in the

indictment, rather than on the basis of some hypothetical charge not here in issue. See *Roth* v. *United States*, 354 U.S. 476, 491-92; *United States* v. *Harriss*, 347 U.S. 612, 617; cf. *United States* v. *Fruehauf*, 365 U.S. 146, 157; *United States* v. *Lem Hoy*, 330 U.S. 724, 725; *United States* v. *Halseth*, 342 U.S. 277, 278-9. See, also, *Barrows* v. *Jackson*, 346 U.S. 249, 255-58 (general discussion of scope of rule that party cannot invoke constitutional rights of others).

As to appellee's motion to affirm on the ground that there is no substantial federal question, we believe that it is sufficient to note that to the best of our knowledge there is no situation in which this Court has refused the government's request to give plenary review to a decision of a lower court holding a statute of Congress unconstitutional.

The question is substantial and properly before the Court. Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

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